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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 576

JOHN J. FAHEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S PETITION FOR REHEARING

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Subject Index

	Page
Petitioner's Petition for Rehearing	1
Conclusion	4

Table of Authorities Cited

Statutes

	Pages
18 U.S.C. Section 1	3
26 U.S.C. 6651	2
26 U.S.C. 7203	2, 3

Constitutions

United States Constitution, Fifth Amendment	2

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Implicit in the trial court's memorandum opinion,[1] the opinion of the United States Court of Appeals for the Ninth Circuit,[2] all the briefs on file herein and the silence of this Court in denying the petition for writ of certiorari, is the conclusion that if this Court grants the relief sought by the petitioner serious and detrimental consequences will adversely effect the fiscal structure of the United States. In simpler words,

[1]Petition for Writ, Appendix B, page ii.
[2]411 Fed.2d 1213, Petition for Writ, Appendix C, page iv.

people will stop paying their taxes and money will not be available to maintain the functions of government.

The conclusion is erroneous.

Civil penalties such as those assessed upon petitioner are sufficiently adequate to have the requisite deterring effect upon taxpayers who willfully and without a fraudulent intent do not file their Federal Income Tax Returns within the time set by Congress.[3]

Federal Income Taxes owed, together with penalties, cannot be discharged in bankruptcy and have the highest priority as a lien and claim.[4]

The opinion of the trial court, together with its comments, and the opinion of the Court of Appeals are based upon the premise that a conviction under 26 U.S.C. 7203 is a *petty* offense. Hence, their interpretation of what *intent* is requisite to sustain a conviction is incorrect.

In analyzing the conclusion that petitioner's conviction was based upon a *malum prohibitum* offense, the record appears to be devoid of any discussion by

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[3]26 U.S.C. 6651 provides for a statutory assessment of 5% per month for each of the first five months that a taxpayer fails to file a late return plus interest at the rate of ½ percent per month until paid. Even in these days of tight money, it is prohibitive to "borrow" from the government with such an assessment being in force and effect.

[4]To impose a fine or jail sentence together with the statutory penalties contravenes the ideological opposition of double punishment for a single act proscribed by the intent of the "double jeopardy" clause of the Fifth Amendment.

counsel or the courts of the statutory definition of a federal misdemeanor as defined by Act of Congress.[5]

The Third and Fifth Circuits, in requiring a specific intent to defraud, have grasped the intent of Congress and apply the *malum in se* test to this "high" misdemeanor as is requisite in a felony.

If Congress intended a different definition of intent to apply to this misdemeanor than to a felony, logically it would have made the penalty for a violation of 26 *U.S.C.* 7203 fall within the prescribed limits of a *petty* offense which, "like a traffic offense", needs no specific intent.

Though this distinction was not discussed, the issue was raised by the trial court and, evidently, it was bothered by it.[6]

In the trial court the maximum penalty which could have been assessed upon the Petitioner would be three years imprisonment plus a fine of $30,000.00.[7]

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[5]"Section 1. *Offenses classified*

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

18 U.S.C. Section 1.

[6]". . . Of course, you know there are many offenses where just the simple doing of an act which is prohibited by law is sufficient to convict. Your traffic offense is one. You are caught speeding. It doesn't make any difference whether you intended to break the law or not; just the simple doing of the act is enough.

Now I have a question: Is this one of that class of cases? . . ." (TR 146).

[7]26 U.S.C., Section 7203.

The answer to the trial court's question, of course, is that if the offense were a petty misdemeanor, the *malum prohibitum* or "traffic ticket" standard is applicable, but not otherwise.

It would be a travesty on justice should the petitioner, in the twilight of his career, be forced to suffer one year imprisonment because the Ninth Circuit has *singularly* imposed a "traffic ticket" standard to the *intent* required to sustain his conviction.[8]

When a major conflict in interpretations exist between the circuits, such as we have here, allowance of the writ is compelled.

CONCLUSION

It would indeed be amazing if, in this era of the great evolution of constitutional law, the geographic location of a defendant's residence should be determinative of innocence or guilt—of whether he is to be a free man living in society providing services for his clients and the necessities of life for his dependents; or, whether he will be confined within the walls of a prison for what can be a substantial portion of the remainder of his life.

Petitioner is entitled to equal application and equal protection of the law.

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[8]It is interesting to note that the trial transcript shows petitioner was more interested in devoting his time to indigent clients in the State Court than he was in presenting any sort of a bill to the Court for his services. See the trial testimony of the Honorable John A. O'Kane, Judge of the San Francisco Municipal Court (TR 94-96).

Since this Court ultimately must decide the conflict existing between the circuits, it is submitted that this case is a proper one in which to have the question resolved.

Dated, December 31, 1969.

Respectfully submitted,

EDWARD L. CRAGEN,

Counsel for Petitioner.

CERTIFICATE

Edward L. Cragen hereby certifies that he is the attorney for appellant herein and that he is an active member of the bar of the United States Supreme Court. He has prepared and read the foregoing petition for rehearing and in his opinion the same is well founded in law and proper to be filed herein. The petition is not presented for purposes of delay or vexation.

Dated, December 31, 1969.

EDWARD L. CRAGEN,
Counsel for Petitioner.

Certificate of Service

Edward L. Cragen hereby certifies that he is an active member of the bar of the Supreme Court of the United States; that on this day he served a copy of the petition for rehearing herein upon the United States by depositing the same this date in the United States mail at San Francisco, California, addressed as follows:

Honorable Erwin N. Griswold,
Solicitor General of the United States,
Department of Justice,
Washington, D.C. 20530
(Air Mail postage prepaid)

Honorable Cecil Poole,
United States Attorney,
450 Golden Gate Avenue,
San Francisco, Calif. 94102
(First Class postage prepaid)

Dated, December 31, 1969.

Edward L. Cragen,
Counsel for Petitioner.